7' 1" and its offside rear tyre 7' 9" from the central white line. The motorist had clearly kept to her side of the road, and had never crossed over this line or gone too near to it. The motor-cycle was lying behind the motor-car on the motorist's side of the road. It was denied by the motor-cyclist that the motor-cycle had fallen as shown in the sketch and it was suggested that it had been moved. That could possibly be true since from the evidence of the damages to the vehicles, the collision was between the front of the motor-cycle and the offside bumper or front mudguard of the car. But the whole evidence indicated clearly that the accident occurred on the motorist's half of the road. And this was the finding of the learned judge.

But despite this evidence, he held the motorist blameworthy because he

"...found that the plaintiff had not yet turned his motor-cycle towards Seang Teik Road but had stopped to allow the defendant's car to pass him first. Although the defendant was not driving very fast, yet, on the evidence, I found that in chatting with her husband and probably looking at her baby whilst she was driving a motor-vehicle, the defendant's attention was distracted and she momentarily lost her power of concentration and control over the car whilst driving it and therefore failed to have sufficient regard for other traffic on the road."

Here then is the rationale for the learned judge's decision, but unfortunately the passage contains inferences of facts not justified by the evidence and at least one instance of pure speculation.

With great respect, if the motor-cyclist said he had stopped on his side of the white line and he was disbelieved, there could be no justification for the finding that he had stopped on the other side of the line, when he never said he did. And if he did not stop, then the conclusion must be that he had continued on his way, turned to go into the side road, getting into the motorist's path and run on to the side of the motor-car as the damages to the vehicles showed. There was also never any charge by the motor-cyclist that the motorist had lost control of the car. What he charged her with was disregarding his presence on his proper side of the road and running him down. The finding of loss of control of the car was therefore completely unjustified. Again, it was never put to the motorist that she was chatting with her husband, so that she had not the opportunity to deny it. There was not even the suggestion of any evidence to support this finding. As for the charge that she was probably looking at her baby whilst driving, that was clearly speculative. No evidence was adduced to support it. She was never asked to admit or deny it. It was not even suggested by the motor-cyclist.

There being therefore no evidence to support the findings of the learned judge, we came, with respect, to the conclusion that the judgment finding the motorist equally to be blamed for the accident could not stand. The evidence, in our view, too clearly pointed to the entire negligence of the motor-cyclist.

We therefore allowed the appeal with costs here and in the court below and set aside the judgment of the High Court. The respondent's claim stood dismissed.

Appeal allowed.

Solicitors: *Lim Kean Siew & Co.; B.S. Sidhu & Co.*

PLANTATION AGENCIES SDN. BHD. v. HAJI ARIFFIN BIN HAJI ISMAIL

[F.C. (Ong Hock Sim, Raja Azlan Shah and Wan Suleiman F.JJ.) December 9, 1977 and January 12, 1978]

[Penang — Federal Court Civil Appeal No. 116 of 1977]

Practice and Procedure — Parties — Doubt as to person to sue — Principal and agent — R.S.C., 1957, O. 16 r. 7.

Contract — Employment — Employment agency — Person employed through employment agency for employer — Dispute as to terms of service — Whether employee can sue the employment agency — Contracts Act, 1950, s. 183.

Agency — Employment agency — Contract entered on behalf of principals — Liability.

In this case the respondent had applied for a declaration relating to the terms and conditions of service of his employment. He sued not only his employer but also the appellants, who acted as the agent of the employer and other rubber estates to recruit personnel for the rubber estates. The appellant applied to be struck out from the writ but his application was dismissed in the High Court as the learned judge held that the appellants were the agents of the employer and the respondent could rely on Order 16 rule 7 of the Rules of the Supreme Court as there were doubts as to whom he should sue.

Held, allowing the appeal: (1) the appellants were not the employers of the respondent and the action should not have been brought against them;

(2) the appellants as agents were not personally liable on contracts entered into by them on behalf of their principals.

Case referred to:-

(1) *Prenn* v. *Simmonds*, [1971] 3 All E.R. 237.

FEDERAL COURT.

N.G. Sivanandan for the appellant.

H.R. Sankey for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): The respondent on February 8, 1977 issued out a writ for a declaration

(i) that he is entitled to be emplaced on the salary scale of the Plantation Agencies Standard Terms of Service for Executive Staff on Estates which became effective on January 1, 1974 and all subsequent revisions thereto, and

(ii) that he is entitled to be paid all arrears of salary and all other benefits to be computed in accordance with the aforesaid Standard Terms.

These were the substantial reliefs sought to be obtained in the endorsement to the writ, though he did include in the statement of claim the usual omnibus prayer for such other relief as the court might deem fit. He sued two defendants, (1) Perbadanan Kemajuan Negeri Kedah and (2) Plantation Agencies Sdn. Bhd.

The question in this appeal is whether he was right to have sued Plantation Agencies Sdn. Bhd.

In his statement of claim, the respondent stated in clear and unmistakable terms that the first defendant was at all material times his employer and that the second defendant (the appellant before us) was the agent negotiating the said employment. He had entered into employment under the first defendant as manager of a rubber estate owned by the first defendant. The terms of the employment were in writing, in a form described as the Plantation Agencies Sendirian Berhad or PASB Standard Terms. This form

was an agreement between Perbadanan Kemajuan, Negeri Kedah (the Company) of the one part and the respondent (the employee) of the other part and provided that "the Company shall employ the Employee and the Employee shall serve the Company upon and subject to the terms and conditions set out in the Schedule hereto." The period of service was continuous from March 1,1974. The schedule attached thereto contained the terms and conditions of the employment. It is clear therefore that the relationship between the respondent as employee and the first defendant, the Company, as employer is to be determined within the four corners of the contract of employment between them. It is just as clear that the reliefs sought by the respondent were available only against the company as employer, being questions of emplacement on the salary scale in the contract of employment.

Nonetheless the respondent deliberately elected to join in the appellant as a co-defendant. But all that he could allege in his statement of claim against the appellant was contained in paragraph 4. He averred that

"4. On or about 21st January 1974 the plaintiff was invited by the second defendant to enter into an agreement in writing with itself, for and on behalf of the first defendant as employer, for the appointment as manager of a rubber plantation known as Ladang Raykat Laka-Temin, owned by the first defendant."

He had a further averment that the appellant had advised him after entering into the employment of upward revisions of the salary scale. But it is obvious having regard to the form of the actual agreement that the qualifying phrase "with itself" meaning the appellant in paragraph 4 of the claim is a mistake and that the agreement was with the first defendant.

The relationship between the defendants is set out in an Agreement dated August 26, 1972. Under it, the appellant was appointed an agent for the Company. Consequent on this appointment, the agreement of employment between the respondent and the Company was signed by the appellant. In it, the appellant was clearly stated to be signing as agent for and on behalf of the Company. There could be no doubt whatsoever of the status of the appellant.

In its capacity as an agent, the appellant thought it should not have been sued and consequently made an application by summons-in-chambers to be struck out from the action. At the hearing of the application, which was adjourned into open court, counsel for the respondent objected to it on the grounds that it was premature and that the appellant was not simply an agent, there being said to be much more to it. At the hearing of the appeal the same counsel suggested that the relationship between the first defendant and the appellant was not simply that of principal and agent. But what more there was, was never made clear.

It transpired however from the affidavits that in the view of the respondent, the appellant was not a mere employment agency for the group of estates managed by it but was itself an employer of personnel whose services were made available to those in the group. But while that might be so in other cases, it was not so in this. There was no doubt whatsoever that the respondent was employed not by the appellant but by the first defendant. The employment was undeniably secured by the appellant but that did not detract from the fact that the respondent was employed and paid by the first defendant and no other. From the exhibits, it further transpired that the respondent was previously in the employment of Plantation Holdings and entertained for some time a fear that his new employment under the first defendant might not be satisfactory. He was anxious in such an event for it to be possible for him to revert to his old employment without loss of service. He was also anxious that his new appointment would not constitute a break in his service. These matters are of no concern to this appeal, nor, we would add, to the decision on the summons-in-chambers and it would be sufficient to note, in the first place, that it was pointed out to the respondent, in a letter of February 19, 1974 from the appellant, that

"... We are not, and never been have, your legal employer and it is necessary to go through the correct process of terminating your service with one employer and entering an agreement with the next."

The state of affairs which it described not only was correct but was also accepted by the appellant when he did enter into the agreement with the first defendant. Secondly, the respondent's case was not a case of seeking re-employment with the appellant.

But the opposition to the summons-in-chambers on these grounds was accepted by the learned judge as sufficient to dismiss the application. After adverting to the pleadings and the reliefs sought by the respondent, he held

"It is apparent that the main issues are the terms under which the plaintiff is employed. And the second defendant is so closely connected with the manner and terms of service of the plaintiff's employment that it cannot claim it has been wrongly joined as defendant. Whether it is correctly joined or not can only be determined at the trial. At this stage when the issues are not before the court, it is premature for the second defendant to ask to be struck out."

He also thought that this was a case in which the plaintiff must reasonably have doubts as to whom he should sue and therefore was correct under Order 16 rule 7 Rules of the Supreme Court to join in both. In his view, this rule was most commonly applied to cases of principals and agents. To quote,

"Action(s) in which principals and agents are joined as defendants are the most common instances of actions involving this rule."

With the greatest of respect, that is not the correct law. Neither is it the correct application of the rules of court. Nor is it the correct reading of the pleadings and the averments therein.

The easiest example of the application of Order 16 rule 7 Rules of the Supreme Court that springs to our mind is that of the innocent victim of a collision between two vehicles. In the uncertainty as to whose fault the accident is attributable, it would be wise and the rule makes it possible, for him to sue both drivers. The rule is of course not restricted to such cases but it certainly is not applicable to the case of an agent who has disclosed his principal. In such a case, it is not the application of this or any rule of court or rule of practice. It is a matter of substantive law. And the law is laid down in section 183

Contracts Act which was urged on the learned judge at the hearing, but ignored. It reads

"183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him, on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases:

(a) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; and

(b) where the principal, though disclosed, cannot be sued."

And as a matter of law, the respondent could have no cause of action, on the pleadings, against the appellant. As counsel for the appellant put it, the reliefs sought by the respondent are not capable of being enforced against the appellant.

Contrary to what the learned judge held, the issues were, with respect, before the court. The defence of the first defendant was filed before the summons-in-chambers. On both the statement of claim of the respondent and the defence of the first defendant, the issue was clearly the respondent's entitlement to be emplaced at a certain level in the revised scale of emoluments. It was a claim by an employee against his employer. It was a claim disputed by the employer. It was a matter strictly between employee and employer. The agent who engaged the employee for the employer even if it also supervised the work of the employee for the employer and against whom the employee had sought no reliefs, had no liabilities to meet.

As for the correspondence between the respondent and the appellant before the contract of employment was signed, which the respondent introduced in an affidavit and which was also urged on us, we admit to some difficulty in understanding its relevance. If it was sought by it to give another or an additional meaning to the contract of employment, it was inadmissible by section 92 Evidence Act. We agree, with respect, with the dictum of Lord Wilberforce in *Prenn* v. *Simmonds*[1] at page 241 that

"... evidence of negotiations, or of the parties' intentions, and a fortiori of Dr. Simmond's intention (that is, of one of the parties to the dispute) ought not to be received and evidence should be restricted to the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

If that was not the purpose for its introduction, then we do not, with respect, see how it could assist the respondent in resisting the application, or the court in coming to a decision.

For these reasons, we allowed the appeal with costs here and in the court below and we made an order in terms of the summons-in-chambers that the appellant be struck out from the writ.

Appeal allowed.

Solicitors: *Presgrave & Matthews; H.R. Sankey & Co.*

SYARIKAT SENG LIAN TRADING v. ROXY (MALAYSIA) SDN. BHD.

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Wan Suleiman F.J.) December 7, 1977 and January 24, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 99 of 1977]

Practice and Procedure — Garnishment — Garnishee disputing liability — Whether Assistant Registrar can dispose of matter in summary manner — No consent by garnishee — Order should have been made for trial as in an action — R.S.C., 1957, O. 34 r. 9 and O. 45 r. 4.

In this case the respondents, a judgment creditor, had served a notice of garnishment on the appellants. The appellants denied owing any money to the judgment debtor. The Senior Assistant Registrar ordered that the issue of indebtedness be tried before her and eventually she found that the appellant, the garnishee, was indebted to the judgment debtor in the sum of $74,676.46 and ordered the appellants to pay this amount to the judgment creditor. The appellants applied to the judge to set aside the proceedings but the application was dismissed. The appellants appealed to the Federal Court.

Held, allowing the appeal: as the garnishee disputed his liability in this case and as on the facts he had not consented to have the matter dealt with in a summary manner the learned Senior Assistant Registrar had no jurisdiction to try the issue in dispute and should have referred the matter to the judge for trial.

The following cases were cited in argument: *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152; *Lowe* v. *Love* (1878-9) 10 Ch. D. 432, 433; *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1974] 1 All E.R. 209, 214; *Mark T. McKee* v. *Evelyn McKee* [1951] A.C. 352.

FEDERAL COURT.

M. Sivalingam (*P. Cumaraswamy* with him) for the appellant.

K. Anantham for the respondent.

Suffian L.P. (delivering the grounds of decision of the Court): We allowed this appeal and now give our reasons.

Roxy (Malaysia) Sdn. Bhd. ("judgment creditor" and respondent before us) obtained judgment against P.J. TV and Densun (M) Sdn. Bhd. ("judgment debtor"). The judgment creditor thought that Syarikat Seng Lian Trading (garnishee and appellant before us) owed money to the judgment debtor, so they served a notice of garnishment on them, saying that all property to which the judgment debtor was entitled and which was or shall be under the control of the garnishee Syarikat was attached in its hands as garnishee. In due course the garnishee appeared in chambers before the Senior Assistant Registrar. The garnishee denied owing any money to the judgment debtor. The learned Senior Assistant Registrar ordered that the issue of indebtedness, if any, of the garnishee to the judgment debtor and the amount of the indebtedness be tried before her and that the garnishee produce all books and other relevant documents for the determination of this issue. Trial of this issue before the Senior Assistant Registrar in chambers occupied nine days between January 8, 1976, and April 2, 1976, at which the judgment creditor was represented by counsel and the garnishee not. In the event the learned Senior Assistant Registrar found that the garnishee was indebted to the judgment debtor and after a further enquiry ordered that the garnishee pay the judgment creditor $74,676.46. That was on April 28, 1976.

The garnishee applied to the judge to set aside the proceedings before the Senior Assistant Registrar